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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 75 21

CHAMPLIN REFINING COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR CHAMPLIN REFINING COMPANY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 75

CHAMPLIN REFINING COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF ON BEHALF OF THE CHAMPLIN REFINING COMPANY

Opinions Below

The majority opinion of the specially constituted District Court for the Western District of Oklahoma and the dissent are reported in 59 Fed. Supplement, pp. 978-986 inc., and appear in the record, Vol. I, pp. 79-93 inc.

The report in question was entered upon reargument, by a majority of the Interstate Commerce Commission on July 12, 1944, Chairman Patterson and Commissioner Porter dissenting, in a proceeding entitled Champlin Refining

Company, Valuation Docket No. 1267, reported in 49 Valuation Reports 542-549 inc., and printed in the Record, Vol. II, pp. 537-546 inc.

The original report in such proceeding was entered on December 14, 1942, by Division 2 of the Interstate Commerce Commission, reported in 49 Valuation Reports 463-470 inc., and printed in the Record, Vol. II, pp. 526-536 inc.

Jurisdiction

The suit is to enjoin enforcement (R. Vol. I, p. 12) of certain orders of the Interstate Commerce Commission. The final decree of the trial court dismissing Appellant's petition (R. Vol. I, p. 113), now before this Court for review, was entered on April 16, 1945, by a specially constituted District Court, organized pursuant to 38 Stat. 220, U. S. C., Title 28, Sec. 47. The petition for appeal (R. Vol. I, p. 114) was filed, and the order of allowance (R. Vol. I, p. 114) was entered April 16, 1945. The cause was docketed in this Court on May 14, 1945 (R. Vol. I, Cover Page).

The jurisdiction of this Court is founded upon the following statutes: Urgent Deficiencies Act of October 22, 1913, C. 32, 38 Stat. 219-221, as amended; U. S. C., Title 28, Secs. 45, 45a, 47 and 47a; and U. S. C., Title 28, Sec. 345, par. 4.

> See Statement as to Jurisdiction heretofore printed in conformity with the rule and now on file in the office of the Clerk of this Court.

Statement of the Case

On May 15, 1941, the Interstate Commerce Commission served upon the Champlin Refining Company copies of Valuation Orders (Nos. 26 and 27, R. Vol. II, pp. 486-522, inc.), together with instructions and sample notes pertaining to the preparation and filing by common carriers by pipe line

of information required for use in valuation of such pipe line properties.

On July 18, 1941, Champlin filed a report (marked Exhibit X, which by stipulation was not included in the printed record by reason of its extended volume) which report was returned to Champlin on July 22, 1941, with the advice that such report could not be considered as in compliance with such valuation orders. (49 Val. Rep. 463; R. Vol. I, p. 161).

Subsequently Champlin filed its petition with the Commission, which as later amended, alleges, among other things, that it is not a common carrier, and is not engaged in transportation within the meaning of the Interstate Commerce Act. ((49 Val. Rep. 463; R. Vol. I, p. 160)

A hearing was held on the petition, briefs were filed and oral argument heard. (49 Val. Rep. 463; R. Vol. II, pp. 526-527)

Division 2 in its report thereon published on December 14, 1942, found adversely to Champlin upon all of its contentions.

A petition for rehearing, reargument and reconsideration was thereupon filed. The petition was granted (except as to rehearing) and reargument was had to the entire Commission. The report by the majority of the Commission (Chairman Patterson and Commissioner Porter entering their dissent) was published on June 12, 1944 (49 Val. Rep. p. 542; R. Vol. II, pp. 537-546) and again found adversely to Champlin upon all of its contentions.

This suit was brought under the provisions of the Urgent Deficiencies Act of October 22, 1913, to set aside and enjoin the enforcement of the order of June 12, 1944, entered upon said report of that date. (R. Vol. I, p. 1)

Champlin is a New Mexico corporation engaged in producing, refining and marketing crude oil and the refined

products thereof. (49 Val. Rep., p. 542; R. Vol. II, p. 527)

The pipe line involved which Champlin solely owns and operates, is a 516-mile products pipe line, consisting of welded 6-inch pipe extending from Enid, Oklahoma, to Rock Rapids, Iowa. In connection with the pipe line, Champlin operates terminals with storage tanks as well as railroad and truck delivery facilities at Hutchinson, Kansas, Superior, Nebraska, and Rock Rapids, Iowa. The construction of the portion of the pipe line from Enid through Hutchinson to Superior, 256 miles, and of the terminal facilities at Hutchinson and Superior, was completed in June, 1935. The portion of the pipe line from Superior to Rock Rapids, 260 miles, and the terminal facilities at the last-mentioned point were completed in May, 1940. Storage facilities have been provided at the terminal stations with approximate capacities as follows: At Hutchinson, 161,000 barrels; at Superior, 191,000 barrels; and at Rock Rapids, 330,000 barrels. The total cost of the pipe line and appurtenant facilities as of December 31, 1940, was $3,189,028.66.

For some years prior to 1935, the Champlin business showed a steady decline, because of the construction of competitors' refineries in areas near Champlin markets and the operation of competitors' pipe lines, barge lines, and transport trucks which provided sources of supply near many former Champlin customers, all of which was destructive of Champlin's trade connections in the territory thus affected. The pipe line was built in an effort to meet competitive prices and regain such lost markets. The construction of the pipe line immediately resulted in an upward trend in Champlin's business so that by 1940 the company had reached a volume of business equal to the peak previously enjoyed. That Champlin meets keen competition in the territory served is indicated by the fact

that for the first six months of 1941 the total sales of Champlin in the States of Colorado, Kansas, Nebraska, Iowa, Minnesota, and South Dakota, which are served by the pipe line, equaled 3.5 percent of the whole business of the petroleum industry in those States. (49 Val. Rep. 464; R. Vol. II, pp. 528-529)

The products are marketed at the terminal, at a price which equals the cost at the jobber's place of business of like products sold by Champlin's competitors. (49 Val. Rep. 465; R. Vol. II, p. 530)

Champlin retains title at all times to the products while in transit in said products pipe line, and until sold from the storage tanks at the terminals. (R. Vol. I, p. 209)

Champlin has never transported, offered to transport or been asked to transport any products belonging to any other company or person; its pipe line does not connect with any other pipe line but only with the storage tanks at the three terminal points; there is no point at which any petroleum product can be put into the line other than at the Enid refinery; delivery of the products at the three terminal points is made from the storage tanks by means of truck racks or railroad tank-car racks and is not made directly from the pipe line in any instance; no tariffs have been filed with the Interstate Commerce Commission or with any State Commission or regulatory body (R. Vol. I, pp. 110-111); and the right of eminent domain has never been exercised by Champlin in connection with this pipe line. (49 Val. Rep. 467; R. Vol. II, p. 532)

Champlin has never made exchanges of products in the operation of said pipe line. (R. Vol. I, p. 236)

The Questions Involved and Their Importance

The ultimate questions presented by this appeal are substantial and the answer to them will determine whether a re-

finer of crude oil products may, without invoking the exercise of the right of eminent domain, but solely by the use of privately-obtained right-of-way, construct across state lines, a private products pipe line as a plant facility for the moving of such refinery products, *only*, out of refinery operating tanks, into storage tanks located in other States, for *future* sale by such refiner from such storage tanks *only*, without thereby dedicating such pipe line to the use of its competitors as a common carrier for hire.

The trial court did not hold Champlin to be a common carrier in fact. It held it to be a "statutory common carrier," and that it is engaged in transportation within the meaning of the Interstate Commerce Act. (R. Vol. 1, pp. 83, 84) Therein lines the error of the trial court's judgment.

Specification of Assigned Errors

The following errors of the District Court have been assigned, and will be urged in this brief:

1. The error of the District Court in holding that Appellant is engaged in interstate transportation by pipe line within the meaning of the Interstate Commerce Act, and is therefore subject to the regulatory authority and control of the Interstate Commerce Commission. (Assignments of Error, R., Vol. I, p. 115; Vol. II, p. 957.)

2. The error of the District Court in holding that Appellant in the operation of its pipe line is a common carrier within the meaning of Section 1 of the Interstate Commerce Act, and is therefore subject to the Interstate Commerce Act. (Assignments of Error, R., Vol. I, p. 115; Vol. II, p. 957.)

3. The error of the District Court in holding that the Interstate Commerce Act, construed to reach Ap-

pellant's operations and subject Appellant to the duties and burdens of a common carrier under the Act, is constitutional. (Assignments of Error, R., Vol. I, p. 115; Vol. II, p. 958.)

4. The error of the District Court in dismissing Appellant's petition. (Assignments of Error, R., Vol. I, p. 115; Vol. II, p. 959.)

Statutes Involved

On the merits of the case, the statute involved is Section 1 of the Interstate Commerce Act (41 Stat. 474-478, 49 U. S. C. Sec. 1). In 1906 Congress, through enactment of the Hepburn Amendment to the Interstate Commerce Act, first acted to regulate interstate transportation of oil by means of pipe lines. The section was again amended in 1920, and again in 1934, 1935 and 1940.

A consideration of the first amendment is important in determining the application of the last amendment to the facts of this case.

The Hepburn Amendment (34 Stat. 584), in so far as it pertains to transportation of oil by pipe line, is printed in the Appendix, post, pages 64-67, inc. The language of the amendment which is of importance here is as follows:

> "That the provisions of this Act shall apply to *any corporation or any person or persons engaged in the transportation of oil or other commodity,* except water and except natural or artificial gas, *by means of pipe lines,* or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this Act,** and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or

* Emphasis here and throughout the argument is supplied, unless otherwise indicated.

partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, * * *."

The amendment of 1920 (41 Stat. 474-478, 49 U. S. C. Sec. 1), in so far as it pertains to transportation of oil by pipe line, is printed in the Appendix, post, pages 67-71, inc. The language of importance here is as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in * * *

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; * * *

"(3) The term 'common carrier' as used in this Act shall include all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."

By later amendments (48 Stat. 1102, 49 Stat. 543, 54 Stat. 899, U. S. C. Title 49, Sec. 1) the part of subparagraph (3) of Section 1, last quoted above, was changed so that it now reads as follows:

"The term 'common carrier' as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire * * *."

ARGUMENT

I

The error of the District Court in holding that Appellant is engaged in interstate transportation by pipe line within the meaning of the Interstate Commerce Act, and is therefore subject to the regulatory authority and control of the Interstate Commerce Commission.

The Interstate Commerce Act is directed at transportation in interstate commerce. Disregarding for the present the Government's contention, sustained by the trial court, that the Amendment of 1920 brought within the reach of the Act all interstate pipe lines, the issue as to whether or not Appellant's pipe line operations are within the coverage of the Act depends upon whether or not Appellant is engaged in "transportation" within the meaning of the Act. The trial court found in the facts a basis for holding that Appellant is engaged in "transportation" within the meaning of the Act. The trial court's statement was "plaintiff is transporting oil products *to market for sale to the public* and thus is engaged in transportation in commerce within the meaning of the Act" (R., Vol. I, p. 83).

(a) The Original Act to Regulate Commerce

Section 1 (see Appendix, pages 63-64) of the original statute (An Act to Regulate Commerce, Act of February 4, 1887, 24 Stat. 379) provided:

> "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment . . . ."

The purpose of the statute was to prohibit rebates, discriminations and other abuses by common carriers, to require that they establish and post rates, fares and charges, and to prohibit their charging unjust or unreasonable rates. *Interstate Commerce Commission* vs. *Baltimore and Ohio Railroad Company,* 145 U. S. 263. The statute was directed at existing carriers. It is obvious from the language above quoted that the term "transportation" was used to describe interstate transportation by persons engaged as carriers for others. There is an absence of any language indicating a different intent. The use of the term "transportation of passengers" would make this conclusion inescapable even if the term "common carrier" did not appear in the text of the statute. If the term "transportation" had been used to include the movement by a person of his own property from one State to another by use of his own private means, the statute would then have had the effect of subjecting such person and his property to the burdens, duties and regulations imposed by the statute. So construed, the statute would have been in conflict with the due process clause of the Fifth Amendment. (Chief Justice White's concurring opinion in *The Pipe Line Cases,* 234 U. S. 548, 562-563; *Smith* vs. *Cahoon, Sheriff,* 283 U. S. 553; *Frost & Frost Trucking Co.* vs. *Railroad Commission of California,* 271 U. S. 583; *Stimson Lumber Company* vs. *Kuykendall,* 275 U. S. 207, 210; *Michigan Public Utilities Commission et al.* vs. *Duke,* 266 U. S. 570; *Producers Transportation Company* vs. *Railroad Commission of California,* 251 U. S. 228).

(b) The Hepburn Amendment of 1906

The language which appeared in the original statute of 1887, *supra,* which was carried forward in the Hepburn Amendment (34 Stat. 584), is italicized in the following quotation from Section 1 of the Hepburn Amendment:

"*That the provisions of this Act shall apply to any* corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any *common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)* * * *."

The word "transportation" was used a number of times in the original statute. There is no language or expression in the original statute (24 Stat. 379) to indicate that the term was there used in different senses in different instances. In the absence of expressions to indicate a contrary intent, it will be presumed that the word was used in the same sense in each instance. (*United States* vs. *Cooper Corporation*, 312 U. S. 600, 607.) The term was also used a number of times in the Hepburn Amendment, and it is to be presumed that it was there used in each instance in the same sense.

The rule is that where words and provisions used in an original statute are repeated in an amendment, it will be presumed that they were used in the amendment in the same sense in which they had been used in the original statute, unless there is some expression to indicate a contrary intent. This rule of construction is corollary to the common law rule that the provisions of a prior statute, in so far as they are reproduced in an amendment, are to be construed as a continuation of the provisions of the prior law and not as a new enactment. (*Posadas, Collector, vs. Na-*

tional City Bank, 296 U. S. 497, 505; *Anderson vs. Pacific Coast Steamship Co.*, 225 U. S. 187.)

The language of the original statute does not leave any uncertainty or ambiguity concerning the sense in which the term "transportation" was used. It is clear that the term was used to describe the business of those engaged in transportation of passengers and in carriage of property for others. Used, as the term was, in the Hepburn Act in the same connections as it had been used in the original statute, and the Hepburn Amendment having the same general purposes as the original statute, the term should be treated as having the same meaning in the amendment as it had in the original statute. This conclusion is fortified by the fact that the term "railroad" was used repeatedly both in the original statute and in the Hepburn Amendment. There is no language in either the original statute or the amendment to suggest that the Congress had in mind any type of railroad operation except railroads engaged in interstate transportation of passengers and in carriage of property for others.

In the Hepburn Amendment, interstate transportation of oil by pipe line was brought within the reach of the Interstate Commerce Act. In the very clause which so extended the Act it was provided that the Act should apply to "persons engaged in transportation of oil * * * by means of pipe lines, or partly by pipe lines and partly by railroad." The term "railroad" was evidently used in that clause in the same sense in which it was used in other clauses in the original statute and in the Hepburn Amendment; that is, as descriptive of railroads engaged in carriage of property for others. Certainly the Congress did not intend in this same clause to refer to pipe lines used exclusively by the owner thereof to move such owner's oil as an incident to another business, and to tie that movement to a further

transportation of the oil by common carrier railroad. Congress was speaking of transportation of oil by pipe line carrier engaged in carriage for others and of that type of transportation connected with further transportation by common carrier railroads.

(c) The Amendment of 1920 to the Interstate Commerce Act

In the Amendment of 1920 (41 Stat. 474-478, see Appendix, pages 67-71) there was some change in the language of Section 1 of the Interstate Commerce Act, as amended by the Hepburn Amendment (34 Stat. 584, see Appendix pages 64-67). In the following quotation from Section 1 of the Act, as amended in 1920, the language which was carried forward from the Hepburn Amendment is italicized:

> "(1) *That the provisions of this Act shall apply* to common carriers *engaged in*—
>
> (a) *The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;* or
>
> (b) *The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;* or
>
> (c) The transmission of intelligence by wire or wireless:— • • •
>
> (3) The term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is

used in this Act it shall be held to mean 'common carrier'."

Consistent with the above-stated rules of construction, this Court, in *Valvoline Oil Company vs. United States et al.*, 308 U. S. 141, 145, in speaking of the change of language in the Amendment of 1920, said: "In the present Act there is a change of language, but we perceive none in meaning." The term "transportation," then, when used in the 1920 Amendment, has the same meaning as it had when it was used in the Hepburn Amendment.

If there was ever any uncertainty concerning the meaning of the term "transportation," as used in the Interstate Commerce Act as originally enacted and as amended in 1906 and in 1920, the meaning of the term has been made certain by the opinions of this Court. It refers to and is descriptive of interstate transportation by persons engaged as carriers for others. The statement is warranted by the following opinions of this Court.

(1) The Pipe Line Cases

The holding in *The Pipe Line Cases*, 234 U. S. 548, that the Hepburn Amendment brought within the reach of the Interstate Commerce Act the pipe line operations of the Standard Oil and affiliated companies, but not the operations of the Uncle Sam Oil Company, was necessarily founded upon the conclusion that the term "transportation" was used to describe interstate transportation by a carrier engaged in transporting oil for others. The exception of the Uncle Sam Oil Company from the order reversing the decree of the Commerce Court (*Prairie Oil and Gas Company vs. United States*, 204 Fed. 798) was necessarily founded upon the conclusion that the term "transportation" as used in the Hepburn Amendment was not descriptive of the pipe line operations of that com-

pany, involving only movement of the pipe line owner's oil from one state to another as an incident to its business.

It is clear from the debates in Congress and the opinion in *The Pipe Line Cases* that the Hepburn Amendment was directed at the pipe line operations of the Standard Oil and affiliated companies. The Standard Oil Company and its affiliates had control of the only practical means of oil transportation between the Rocky Mountains and the Atlantic seaboard. They made use of their monopoly of this means of transportation to refuse to carry oil through their pipe lines unless the producers of the oil would sell their oil to the pipe line owners at the latters' price. They carried "everybody's oil," although they compelled "outsiders to sell it before taking it into their pipes." The facts in respect to the pipe line operations of these companies were found to be such that the companies were "common carriers now in everything but form." In substance and effect, they were furnishing a means of transportation for others. They were "not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price." They were common carriers in substance and the Court held that the Congress had power to require them to become common carriers in form (234 U. S. 561).

The Uncle Sam Oil Company's pipe line was used exclusively to transport the oil of that company from its wells in one state to its refinery in another state. The product "when reduced at the refinery passes into the markets of consumption." (Chief Justice White's concurring opinion, 234 U. S. 562.) The question presented as to that company was whether or not such a pipe line operation was "transportation" within the meaning of the term as used in the Hepburn Amendment. On this

subject the Court, speaking through Mr. Justice Holmes, said (234 U. S. 562):

> "It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, *we do not regard it as falling within the description of the Act,* the transportation being merely an incident to use at the end."

Chief Justice White did not agree with the majority in the conclusion that the Uncle Sam Oil Company's pipe line operations did not constitute "transportation" within the meaning of the statute, but based his concurrence in the holding as to that company on the ground that "it would be impossible to make the statute applicable to it (Uncle Sam Oil Company) without violating the due process clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation" (234 U. S. 563).

It does not make any difference whether the view of the majority or the view of the Chief Justice is accepted, for the effect of each is that the Hepburn Amendment did not bring within the reach of the Interstate Commerce Act a pipe line used exclusively in moving the oil of the pipe line owner from one state to another as an incident to the pipe line owner's business of producing and refining crude petroleum and marketing the refined products thereof.

(2) The Valvoline Case

Valvoline Oil Company vs. United States, et al., 308 U. S. 141, is the only case involving pipe line transportation which has been decided by this Court under the Inter-

state Commerce Act as amended in 1920. Valvoline Oil Company was engaged in operating 1,426 miles of pipe line connected with 9,020 wells in Pennsylvania, Ohio and West Virginia. It purchased oil at the wells from the well owners, using a part of it to manufacture products sold by Valvoline and selling a part of it to other refiners in Pennsylvania and West Virginia. However, none of the oil so sold to others was produced outside of the state in which the purchasing refiner was located. Valvoline said in its brief in this Court (page 25, R. Vol. II, p. 946) that the wells served by its pipe line were "stripper wells scattered over Western Pennsylvania, West Virginia and a small part of Ohio," and that "these wells are so small that common carriers cannot afford to construct, maintain and operate lines for transportation of oil in such small quantities." The inference to be drawn from this statement is that, as to wells served by its pipe line, Valvoline had a monopoly of the only practical means of transportation, as had been true of the Standard Oil and affiliated companies in *The Pipe Line Cases*. Valvoline was engaged in purchasing oil from many sources and transporting it by pipe line. The facts in respect to Valvoline's pipe line operations in their essentials were like the facts in respect to the pipe line operations of the Standard Oil and affiliated companies involved in *The Pipe Line Cases*. The only difference was one of degree, which was regarded as "immaterial" (308 U. S. p. 147).

In approving the holding in *The Pipe Line Cases* as to the pipe line operations of the Uncle Sam Oil Company, the Court said in the *Valvoline Case* (308 U. S. 146): "This was held not to be transportation under the Act." In holding Valvoline under the Act, the Court said: "* * * it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline." The carriage by Valvoline, like the carriage by the Standard

Oil Company and affiliates, was in substance and effect for others; and was, therefore, transportation within the meaning of the Act. It was transportation for others.

The *Valvoline Case* was decided upon the same principles upon which it had been held in *The Pipe Line Cases* that the pipe line operations of the Standard Oil and affiliated companies were under the Act; and in pointing out in the *Valvoline Case* the basis upon which the pipe line operations of the Uncle Sam Oil Company were held not to be within the Act, the Court made clear the difference between the pipe line operations of Valvoline and those conducted by the Uncle Sam Oil Company.

(3) The Pennsylvania Railroad Company Case

In *Pennsylvania Railroad Company* vs. *Public Utilities Commission of Ohio,* 298 U. S. 170, the issue was whether intrastate rates applied to switching and delivering four carloads of coal in Youngstown, Ohio, or the charge should be based on the interstate rates from the mines to the point of delivery. Pittsburgh Coal Company operated coal mines in Pennsylvania and by means of its private barges and privately owned and operated railroad moved the coal from its mines in Pennsylvania to its cleaning and sizing plant near Negley, Ohio. After being cleaned and sized at the plant near Negley, Ohio, the four carloads of coal were shipped by common carrier for delivery to consignees in Youngstown, Ohio. Up to the sizing plant the carriage was solely by the Pittsburgh Coal Company, making use of its own facilities. The Pennsylvania Railroad Company and the Erie Railroad Company contended that the local or intrastate rates for switching and delivering the cars in Youngstown should not be applied for that service, but that the charge should be based upon interstate rates from mines to destination. The Court, speaking through Mr. Justice Cardozo, said (298 U. S. 175):

> "The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold that this interstate transportation by an owner who does not carry for anyone else will be tacked to the intrastate transportation by railroads who are in business as common cariers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process."

In illustrating the consequence of such a construction of the Interstate Commerce Act, as appellants urged in that case, the Court further said (298 U. S. 176-177):

> "The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress."

The Court thereby made clear that the term "transportation" as used in Section 1 of the Interstate Commerce Act as it exists today means transportation by persons engaged as carriers for others, and that it does not include the movement of property from one state to another by the owner through the use of his own railroad or pipe line. The Court also made clear that even though such private transportation by an owner of his property or products is *for the pur-*

pose of reaching markets, nevertheless the movement is not "transportation" within the meaning of that term as used in Section 1 of the Interstate Commerce Act.

Elsewhere in the opinion, the Court made it even clearer that the Interstate Commerce Act is not directed at an owner's interstate movement of his own property or products by his own private means. The Court said (298 U. S. 174):

> "The Interstate Commerce Act (49 U. S. C. sec. 1 et seq.) *is aimed at common carriers exclusively,* sec. 1(1), (3), and not even at all these."

Section 1, cited in the quotation last above, is the section which includes the provision that the Act "shall apply to common carriers engaged in * * * the transportation of oil * * * by pipe line." Section 3, cited in the quotation, is the section which provides that "the term 'common carrier' shall include all pipe line companies * * * and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."

(4) The Pittsburgh, Lisbon and Western Railroad Company Case

The transportation facilities of the Pittsburgh Coal Company were involved in *Pennsylvania Railroad Company et al. vs. Pittsburgh L. & W. R. Co. et al.* (C. C. A. 6), 83 Fed. (2d) 861 (certiorari denied, 299 U. S. 572), decided subsequent to the decision in *Pennsylvania Railroad Company vs. Public Utilities Commission of Ohio, supra.* The issue involved in the later case was the right of the Pittsburgh Coal Company to extend its railroad track without authority from the Interstate Commerce Commission. It was the purpose of the coal company to use the track exclusively for the transportation of its coal by means of its own cars and locomotives. In the course of the opinion, holding that it was not necessary that the coal company

secure a certificate of convenience and necessity, the Court said (83 Fed. (2d) 865):

> "The track between Negley and Smith's Ferry is not an instrument of interstate commerce, for no one other than the Coal Company can use it. * * * It is a purely private facility for the private transportation of the Coal Company's product. * * * Its transportation upon the lands of the Coal Company or on the lines of the Lisbon and the Youngstown & Suburban is wholly incidental to the principal purpose of the parent company. There is no interstate commerce in the shipment of this coal by means of private transportation facilities before it reaches the Brush Run preparation plant. * * *
>
> *"Since the coal is carried over this track by its owner, in its own private vehicles, in order to reach its own private plant, its transportation does not constitute interstate commerce."*

(5) The Campbell River Mills Company Case

In *Chicago, M., St. P. & P. R. Co.* vs. *Campbell River Mills Co., Ltd., et al.* (C. C. A. 9), 53 Fed. (2d) 69, 72 (certiorari denied, 285 U. S. 536), after quoting parts of Sections 1 and 2 of the Interstate Commerce Act, the Court held that the term "transportation" meant transportation by common carrier, and in so holding said:

> "The use of the word 'such' in connection with 'transportation' would seem to imply that the transportation which is meant is transportation by common carrier; and the phrase 'as aforesaid' similarly indicates that goods 'not shipped from a foreign country to the United States' *by a common carrier* would not come under the purview of that chapter. Since subsection 1 deals entirely with defining 'common carriers' subject to the provisions of the chapter, it follows that the phrase 'as aforesaid' qualifies the 'shipping' referred to in subsection 2 as being shipping by common carrier."

The cases compel the conclusion that Appellant's pipe line operations are not "transportation" within the meaning of the Act. In the cases cited and discussed above, the term "transportation" as used in the Interstate Commerce Act was treated as descriptive of transportation conducted by persons engaged as carriers in the carriage of property for others. The term was held not to include a person engaged in moving his own property by his own means from one state to another as an incident to his principal business.

The Uncle Sam Company's use of its pipe line was for the private purpose of moving its oil as an incident to its principal business. The Pittsburgh Coal Company was using its facilities exclusively for a like purpose. Appellant, like those companies, uses its pipe line exclusively for the purpose of moving its products as an incident to its integrated business of producing and refining crude petroleum and marketing the refined products thereof. Such a pipe line operation is not "transportation" within the meaning of the Interstate Commerce Act, as the term has been considered and applied in the cases cited. The situation was otherwise with respect to the Valvoline Company and the Standard Oil Company and its affiliates. They were furnishing transportation to the producers of the oil and their operations were, in effect, transportation for others.

(d) The Fact That Appellant Uses Its Pipe Line to Move Its Products to Market Does Not Bring Such Operations Within the Act.

The majority of the trial court found, in the fact that Appellant's pipe line is used to move its products to market centers, a basis for distinguishing this case from the case of the Uncle Sam Oil Company. On this point the trial court said (R. Vol. I, p. 83):

> "The Uncle Sam Oil Company case must be distinguished from the instant case upon the ground that Plaintiff is transporting oil products *to market for sale to the public* and thus is engaged in transportation in commerce within the meaning of the Act."

The difference stated by the trial court to exist between the facts of this case and the facts in the *Uncle Sam Oil Company* case is an imaginary and not a real difference. The Uncle Sam Oil Company's pipe line was used to move its oil from its wells to its refinery, "and the product of course when reduced at the refinery passed [illegible] into the markets of consumption." (Concurring opinion of Chief Justice White, 234 U. S. 562.)

Certainly, there is not such difference between the movement of oil from field to refinery by means of a private pipe line as a step toward marketing products, and moving oil products from refinery to storage near market centers by means of private pipe line as a further step toward marketing products, as to justify the assumption that Congress did not intend to include the first movement within the terms of the Act, but did intend to include the second movement.

There is an utter absence of language which would suggest that Congress intended the purpose of the movement to be a factor for determining what is "transportation" within the Act and what is "private transportation" not within the Act. The Standard Oil and affiliated companies and Valvoline Oil Company were engaged in moving oil from fields to markets. The Uncle Sam Oil Company was moving its crude oil for the ultimate purpose of selling the products thereof. The operations of the Standard Oil and affiliated companies and the Valvoline Oil Company were held under the Act; the operations of the Uncle Sam Oil Company were held not within the reach of the Act, yet each of them was engaged in moving

oil with the ultimate view of marketing. The fact that the oil was being moved toward market was not the controlling factor in determining the applicability of the Act to any of these companies. In the *Valvoline* case the Court said, speaking of the operations of the Standard Oil and affiliated companies, (308 U. S. 144, 145):

> "• • • Whether the oil so owned and transported was ultimately used by the carrier in its own operations *or sold to others was in this connection immaterial.*"

Thus it appears that the fact that the oil was being moved to market is not a controlling factor in determining the applicability of the statute.

Again, the Pittsburgh Coal Company was using its facilities to move its coal "to market for sale to the public," but that fact was not sufficient to bring its operations within the coverage of the Interstate Commerce Act.

The Interstate Commerce Act is directed at persons engaged in transportation for others. The purpose of the Act is to regulate the transportation business of those who enter into engagements to transport property for others or to transport passengers. The object of the statute is to reach and regulate the transportation business of those who sustain toward others the relation of carrier of property to shipper, or carrier to passenger. That such is the purpose and object of the Act is clear from the language in which it is cast. The movement of property or products to market by means of railroad or pipe line, standing alone, is not sufficient to bring the movement within the meaning of the term "transportation" as used in the Act. The element of carriage for others is essential to the "transportation" covered by the the Act.

The Champlin pipe line involved in this litigation does not haul "crude oil." It is solely used for the transporta-

tion of refined products before sale. Obviously no one can have any interest in such products other than the owner thereof. It is undisputed that Champlin has never carried products for others; that it exclusively transports its own products; that there is no point except at the Enid refinery where products can be put into the line; that Champlin has never made exchanges with other companies of products moved through the line; that no products have ever been purchased to be transported through the line; and that Champlin does not earmark any products moved through the line for sale or delivery to others, but that all products come to rest in storage tanks at terminals before any sale or delivery thereof is made to anyone.

II

The error of the District Court in holding that Appellant in the operation of its pipe line is a common carrier within the meaning of the Interstate Commerce Act.

The majority of the trial court did not hold Champlin to be a "common carrier" in fact, nor a "common carrier" in substance, as was held against the Standard and affiliated companies in *The Pipe Line Cases*. The holding was that Appellant is a "statutory common carrier." In holding that Appellant is "a statutory common carrier;" that the provisions of the Act apply to "*all engaged in the interstate transportation of oil* • • • by pipe line;" and that "Congress intended to include all pipe lines without regard to whether they were private lines or carried for the public," the majority of the trial court (1) gave to the Act a breadth of meaning which this Court has twice refused to ascribe to it, (2) failed to take into account the sense in which the term "transportation" is used in the Act, and (3) neglected to give proper consideration to the limitations which the Fifth Amendment imposes on the power of Congress to take private property for a public use.

(a) This Court Has Refused to Give the Act the Breadth of Meaning Given to It by the Trial Court

In *The Pipe Line Cases*, 234 U. S. 548, and in the *Valvoline Case*, 308 U. S. 141, the United States and the Interstate Commerce Commission urged this Court to construe the Act as the majority of the trial court has construed it in this case.

In the opening sentence upon the first point in the brief for the United States in the *Pipe Line Cases* (R. Vol. II, p. 712-13) it was contended that,

> "Congress deliberately intended the act to apply to every interstate pipe line. It intended to compel every interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce. Whether any particular pipe line had or had not been a common carrier prior to the passage of the act is wholly immaterial."

The foregoing contention of the Government is stated in the summary of briefs in *The Pipe Line Cases* (234 U. S. 549) as follows:

> "Congress intended the Act to apply to every interstate oil-carrying pipe line and to compel every such interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce."

The Commerce Court had upheld the Government's contention. (*Prairie Oil & Gas Co. v. United States*, 204 Fed. 798.) That case reached this Court as *The Pipe Line Cases*. In holding that the operations of the Uncle Sam Oil Company were not within the coverage of the Act, this Court overruled the Commerce Court and rejected the Government's contention that "Congress intended the Act to apply to every interstate oil-carrying pipe line and to compel every such interstate pipe line to become a common carrier

as a condition precedent to engaging in interstate commerce."

In the *Valvoline Case* the United States and the Interstate Commerce Commission (their brief p. 13, R. Vol. II, p. 900), urged that "since Valvoline is a pipe line company engaged in the interstate transportation of oil, it comes directly within the statutory definition"; and again (their brief p. 21, R. Vol. II, p. 905), that "The fact that Valvoline is a pipe line company is determinative of the fact that it is a common carrier within the meaning of the Act."

In holding that "* * * it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline" (308 U. S. 146), this Court declined to dispose of the *Valvoline Case* upon the simpler basis, urged by the Government and Interstate Commerce Commission, namely, that Valvoline is a pipe company and that all such companies are subject to the Act. Valvoline was held subject to the Act because it was engaged in "transportation" within the meaning of the Act. What the Court said in the opinion concerning the term "all pipe line companies," considered in connection with the bases upon which the statute was held applicable to Valvoline, clearly indicates that the Court considered the term "all pipe line companies" to be descriptive of such companies as were engaged in "transportation" within the meaning of the Act.

While the Amendment of 1920, involved in the *Valvoline Case*, made certain changes in the language of the Hepburn Amendment, involved in *The Pipe Line Cases*, there was no change in the meaning of the statute. This appear not only from the statement of this Court (308 U. S. 145) but also from the fact that the pipe line operations of Valvoline were held subject to the Act as amended in 1920 upon substantially the same fact bases as the Standard Oil Company

and its affiliates had been held subject to the Hepburn Amendment in the earlier case.

If this Court had considered tenable the contentions of the Government in *The Pipe Line Cases* with respect to the meaning and purpose of the Act, the Uncle Sam Oil Company's pipe line operations logically could not have been held to be beyond the reach of the Act. If the above stated contention, urged by the Government in the *Valvoline Case*, had been considered sound, it would not have been necessary to base the holding that Valvoline's operations were within the reach of the Act upon the statement that, "• • • it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline." The fact that these contentions were rejected in those cases, coupled with the statement in the *Valvoline Case* (308 U. S. 145) that the meaning of the Act was not changed by the 1920 Amendment, compels the conclusion that the language of the 1920 Amendment is not any broader or more inclusive than the language of the Hepburn Amendment, and demonstrates that the trial court erred in holding appellant to be a statutory common carrier.

As a basis, in part at least, for its holding (R. Vol. I, p. 85) that Congress intended to include within the Act "all pipe line companies without regard to whether they were private lines or carried for the public," the majority of the trial court quoted a sentence from the opinion in *The Pipe Line Cases*. The sentence (234 U. S. 559) is: "The provisions of the Act are to apply to any person engaged in the transportation of oil by means of pipe lines." It is only by reading the sentence with an eye blinded to the balance of the opinion that support can be found therein for the breadth of meaning which the majority of the trial court has given to the Act in this case. The sentence means that the provisions of the Act were intended to apply to any

person engaged in transportation, within the meaning of the Act, viz: transportation for others, the type of transportation at which the Act was directed. If the sentence were to be given the literal meaning which the majority of the trial court has given it in this case, the writer of the sentence, Mr. Justice Holmes, could not have held the operations of the Uncle Sam Oil Company to be beyond the reach of the Act.

Further, if Congress had intended the Act "to include all pipe lines without regard to whether they were private lines or carried for the public," as was held by the trial court in this case, and the intent were given effect, the Act would conflict with the due process clause of the Fifth Amendment. This thought will be more fully developed under Subdivision III of the Argument.

Briefly stated, the *Valvoline Case* and *The Pipe Line Cases* held that it was the carriage of oil for others that determined the applicability of the Act. The Standard and affiliated companies were held subject to the Act because they were "common carriers in substance"; they carried "all oil offered if only the offerers would sell at their price;" they were common carriers "in everything but form"; "they carried everybody's oil to market." It was "the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline." This Court in those cases did not hold that either the Hepburn Amendment or the Act as amended in 1920 made common carriers of all companies operating pipe lines across state lines, as the majority of the trial court held in this case. In *The Pipe Line Cases* the exception was made with respect to the Uncle Sam Oil Company, and in the *Valvoline Case* the Court approved that exception. The Court in both cases refused to follow the Government's contention that all companies transporting petroleum by pipe line across state lines are subject to the Act, but held that

those pipe lines are subject to the Act which are in substance common carriers although not so in technical form.

It should be noted in this connection that when arguments were heard on the motion for rehearing, Circuit Judge Murrah said (R. Vol. I, pp. 134-135):

> "I certainly want to say so far as I am concerned that as far as the interpretation or construction of the statutory language is concerned, I have no difficulty in finding that Congress intended to make the Champlin Pipe Line Company a common carrier within the meaning of this statute. I agree with you that the Supreme Court has not gone that far. There isn't any question about it as far as I am concerned. They have refused to go that far. I will put it that way. I say they have refused to do so. I don't know. I can't tell from reading those decisions whether they thought Congress could not do it or Congress did not intend to do it, but I am perfectly willing for them to clear it up, but it does worry me, the question of whether or not we are giving an unconstitutional construction to that. We are not unmindful of the force of our decision."

The quoted statement is significant, as it is important. It is an admission by the majority of the trial court that their decision was not in harmony with the decisions of this Court in *The Pipe Line* and the *Valvoline Cases*.

(b) The Act deals only with such as are "common carriers" in fact, and does not purport by use of the term "all pipe line companies" to create "common carriers" by legislative fiat

The Interstate Commerce Act proposed to correct existing evils by requiring the carriers at which it was directed to furnish transportation at reasonable rates upon reasonable demand; and, to make the proposed remedy effective, Congress required the filing and publishing of rates and charges, prohibited rebates and other discriminations, and

prescribed penalties for violation of the requirements and prohibitions of the Act.

The terms "all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping car companies;" as used in the definition of the term "common carriers" in the 1920 Amendment, should be considered in the light of the overall purpose of the Act and in the light of the express declaration that "The provisions of this Act shall apply to common carriers * * *." They should also be considered in the light of the meaning in whch the terms "transportation" and "transmission" are used in the Act. The first sentence of Section 1 declares that the provisions of the Act shall apply to "common carriers" engaged in the "transportation" of passengers or property, or in the "transmission" of intelligence, evidently referring to "transportation" and "transmission" for others than the carrier—transportation and transmission service rendered by common carriers. The terms first quoted were evidently used in their generally accepted and ordinarily understood meaning to describe and bring within the reach of the Act any company whose business is that of an interstate carrier engaged in the character of transportation or transmission ordinarily conducted by companies of one or the other of the named classes—companies engaged as common carriers in interstate transportation of passengers or in interstate transportation of property for others or in interstate transmission of intelligence for others. The "transportation" of passengers is necessarily a carriage for others than the carrier. Certainly the term "transportation" was not used in one sense when referring to the "transportation" of passengers and in another sense when referring to the "transportation" of property.

It would not do to suppose that Congress intended by the Act to impose the duties and obligations of common

carriers upon all persons who move their property from one state to another by private means of one or the other of the types of means mentioned in the Act; or to suppose, as the trial court has held, that Congress purposed by the use of the term "all pipe line companies," to provide that all persons, firms and corporations engaged in moving oil from one state to another shall be or operate as common carriers, and so by legislative fiat subject privately owned and used pipe lines, like Appellant's pipe line, to the duties and obligations of common carriers. Such a purpose would be offensive to the Fifth Amendment, as is hereinafter shown.

In defining "common carrier" to include "all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; * * *." Congress evidently had in mind companies engaged in interstate "transportation" within the meaning of the term as used in the Act. So understood, the term would refer only to companies engaged in business as common carriers in "the transportation of oil * * * by pipe line * * *; or the transmission of intelligence by wire or wireless * * *." In the *Pennsylvania Railroad Company case, supra* (298 U. S. 170, 174) this Court, citing the section of the Act in which the terms now under consideration were used, said, as we have heretofore stated, that, "The Interstate Commerce Act (49 U. S. C., Sec. 1 *et seq.*) *is aimed at common carriers exclusively,* Sec. 1(1), (3), and not even at all these." Only if the term, "all pipe line companies" is given the interpretation appellant advances, could that statement of this Court stand as a true interpretation of the Act. Conversely, the interpretation given to the term by the majority of the trial court cannot stand if the Act "is aimed at common carriers exclusively," as was said by Mr. Justice Cardozo.

The terms "all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; ex-

press companies; sleeping car companies;" have well understood meanings. The term "all pipe line companies" is descriptive of companies engaged as common carriers in transporting oil by means of pipe line. It does not include a company owning purely private lines, limited in use to some other business or incidental to the business of the owner. *State Tax Commission vs. Petroleum Exploration,* 68 S. W. (2d) 777, 779; *Texas Company vs. Stephens,* 100 Tex. 628, 103 S. W. 481, 487; *Col-Tex Refining Company vs. Hart,* 144 S. W. (2d) 909; *United States vs. Northwestern Ohio Natural Gas Company,* 141 Fed. 198; *Judson on Interstate Commerce,* Sec. 136, p. 220, Second Edition.)

The term "telegraph" companies is descriptive of companies engaged as common carriers in transmitting intelligence. It does not include a railroad operating telegraph lines for the safe and expeditious movement of its trains, but not for use by the public. (*Adams vs. Louisville N. O. & T. RR. Co.* (Miss.) 13 So. 932). In the Post Roads Act (14 Stat. 221, 47 U. S. C. 1) Congress used the term "telegraph company," and provided that such a company might construct lines over the public domain and along military or post roads. Later another statute (21 Stat. 31, 47 U. S. C. 7) was enacted extending the benefits of the former statute to railroads that operated telegraph lines. Evidently it was thought that the term "telegraph company," used in the original statute, did not include a railroad that operated telegraph lines.

The term "telephone" companies is descriptive of companies engaged as common carriers in supplying telephone service for others. It does not include a non-profit association which maintains a telephone system for the convenience and use of its owners only. (*People ex rel. Knowlton vs. Orange County Farmers & Merchants Assn.* (Cal.), 204 Pac. 873.)

The term "express" companies is descriptive of companies engaged in the business of transporting parcels or other moveable property in the capacity of a common carrier. (*American Ry. Express Co. vs. Wright* (Miss.), 91 So. 342.) It does not include forwarding companies who collect, consolidate, ship and distribute less than carload lots of freight and express shipments. (*Acme Fast Freight, Inc., et al. vs. United States et al.*, 30 Fed Supp. 968, affirmed, *Acme Fast Freight, Inc., et al. vs. United States et al.*, 309 U. S. 638.)

Similarly, an oil company operating a line of railroad extending into its refinery is not a railroad corporation (*Humble Oil & Refining Co. vs. Hamer*, 167 S. W. (2d) 272); a lumber company operating a private railroad as an incident to its business is not a railroad company (*Sisk vs. White Oak Lbr. Co.* (Dist. Ct.), 14 Fed. (2d) 552; *Taenzer vs. Chicago, R. I. & P. RR. Co.*, 170 Fed. 240, 249); a steel company operating tracks and switch engines for use in switching freight cars is not a railroad company (*Taggart vs. Republic Iron & Steel Co.*, 141 Fed. 910; a lumber company operating a logging railroad is not subject to a statute directed against railroad companies (*Crowley vs. Polleys Lbr. Co.*, 9 Pac. (2d) 1068); a company doing a mortgage loan business, which writes title insurance as an incident thereto, is not an "insurance company" (*Bowers vs. Lawyers Mtg. Co.*, 285 U. S. 182).

There is no language in the Amendment of 1920 to indicate that the terms "pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping car companies;" were used in any sense other than their usual and ordinary meaning. It would do violence to the general purpose of the Act if it were assumed that these terms were used to include corporations which operated pipe lines, telegraph lines, or telephone lines

as an incident to another business, and not for the purpose of making the service available to others than the owners.

It is a matter of common knowledge that many pipe line companies and railroad companies construct along their rights-of-way telegraph or telephone lines and use them exclusively in transmitting messages necessary to the efficient operation of their properties. Appellant owns and operates for weather reports, maintenance of the pipe line and transmission of orders and directions, such type of telephone line from Enid to Rock Rapids (R. Vol. I, p. 169). If the language of the Act were subject to the construction which the majority of the trial court has placed upon it, then Appellant was a telephone company, under the 1920 Amendment, and could have been compelled to open such telephone line to the use of the public in the transmission of messages. Obviously the Congress, in naming telephone companies in the definition of "common carriers," did not intend to include, as such, an oil refining company which operates a private telephone line in the operation of its marketing business; and, by the same reasoning, Appellant cannot be said to be a "pipe line company" because of its operation of a private pipe line as a marketing facility. See *Judson on Interstate Commerce*, Sec. 136, page 220, Second Edition, wherein it is said:

> "As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the act."

It must be concluded that the term "all pipe line companies" was used in the 1920 Amendment to describe companies whose principal business is that of acting as common carriers in the interstate transportation of oil by pipe line; that the term "telegraph companies" was used to describe companies whose principal business is that of

acting as common carriers in the interstate transmission of intelligence; that the term "telephone companies" was used to describe companies whose principal business is that of acting as common carriers in the interstate transmission of intelligence.

When the quoted terms are so understood Appellant's pipe line operations are not within the Act.

The concluding clause of the first sentence of paragraph (3) of Section 1 of the Act, "and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire," does not limit the generality of the next preceding clause naming certain classes of companies, but adds individuals to the classes of companies so named and also adds corporations, which, though not engaged principally in business as common carriers, do as a part of their business engage "in such transportation or transmission as aforesaid as common carriers for hire."

If Congress had intended by the term "all pipe line companies" to include all persons and corporations engaged in operating pipe lines which cross state lines, as the majority of the trial court held, the concluding clause of the statutory definition of "common carrier" would have been a purposeless use of words, in so far as pipe line operations were concerned.

The fact that in the concluding clause Congress used the term "all persons, natural or artificial" demonstrates that Congress recognized that not all owners of interstate pipe lines are "pipe-line companies." The term "pipe-line company" would not, if treated in its ordinary meaning, include a company whose principal business is not that of a common carrier in interstate transportation of oil by pipe line, but which does, as a part of its business, engage in such transportation as a common carrier. Therefore, addi-

tional language was necessary to reach individuals and also to reach companies of the latter description. This was accomplished by the use of the concluding clause of the definition, namely, "and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers *for hire.*" But the Act applies to such persons or companies only if their operations are conducted "for hire." So interpreted the statute does not include Appellant.

It therefore must be concluded that the last clause of the definition pointed out above evidently was intended to bring within the operation of the Act individuals and companies whose principal business is not "such transportation or transmission as aforesaid as common carriers for hire," but who, in connection with their principal business do, by one or the other of the named means, engage in "such transportation or transmission as aforesaid as common carriers for hire." The term "such transportation or transmission as aforesaid" evidently referred to "The transportation of passengers or property * * * by railroad; or the transportation of oil * * * by pipe line * * *; or the transmission of intelligence by wire or wireless," by common carrier, as used in Section 1 of the Act.

Such construction preserves the dominant purpose of the Act—to reach persons and companies engaged in interstate transportation for the public, to require them to render adequate service at reasonable rates, to prohibit discrimination, rebating and other abuses. So construed, the exception of the Uncle Sam Oil Company in *The Pipe Line Cases*, in the light of the statement in the *Valvoline Case* that the amendment did not change the meaning of the original Act, is justified. The statement in the *Valvoline Case* that the last clause of subsection (3) is a "conjunctive not a modifier" and does not affect the generality

of the first clause, is then given its obviously intended meaning.

In 1934 Congress created the Federal Communications Commission (48 Stat. 1064, U. S. C. Title 47, Sec. 152) and therein by sub-paragraph (b) of Section 602 (48 Stat. 1102) provided that:

> "The provisions of the Interstate Commerce Act, as amended, in so far as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1(5) and the provisions of section 1(7), are hereby repealed."

The effect of this repeal was to delete from the first sentence of sub-paragraph (3) of section 1 of the Interstate Commerce Act, defining the term "common carrier," all reference to telegraph, telephone and cable companies operating by wire or wireless, with the result that the sentence was then made to read as follows:

> "The term 'common carrier' as used in this Act shall include all pipe line companies; express companies; sleeping-car companies; and all persons, natural or artificial engaged in such transportation as aforesaid as common carriers for hire." (See Title 49, Sec. 1, 1944 pocket parts, U. S. C. A.)

In the Federal Communications Commission Act (48 Stat. 1066), it was provided that:

> "'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, in so far as such person is so engaged, be deemed a common carrier."

In Section 201 of the Federal Communications Commission Act (48 Stat. 1070) it is provided that:

> "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor • • •"

If Congress had intended in the 1920 Amendment to the Interstate Commerce Act, by use of the terms "telegraph, telephone and cable companies operating by wire or wireless," to bring within the regulatory powers of the Interstate Commerce Commission all such companies, without regard as to whether they operate as common carriers or not, it does not seem reasonable to suppose that Congress in enacting the Federal Communications Commission Act would have stripped the Interstate Commerce Commission of all power over such companies and have subjected only such of them as are common carriers to the jurisdiction of the Federal Communications Commission. The fact that Congress did take from the Interstate Commerce Commission jurisdiction over telegraph, telephone and cable companies and give to the Federal Communications Commission jurisdiction over such of them as are common carriers, indicates that Congress considered that the term "telegraph, telephone, and cable companies operating by wire or wireless," as used in the Interstate Commerce Act, was intended to refer only to such companies as are common carriers. Such legislative interpretation, while not conclusive, is persuasive. It follows that, if the term "telegraph, telephone, and cable companies operating by wire or wireless," as used in the definition of "common carrier" in the Interstate Commerce Act, was used to refer only to such of those companies as are common carriers, then the term "all pipe-line companies" must have been used in the definition in the same sense;

namely, as referring to "pipe-line companies" which are common carriers.

Appellant, the trial court to the contrary notwithstanding, is not a "pipe line company," or a "common carrier," within the terms as used in the Act, nor a common carrier within the common law meaning of the term. Private transportation by Appellant of its own products through its own pipe line as an incident to its business of producing and refining crude petroleum and marketing the products thereof, is not within the Act.

III

The error of the District Court in holding that the Interstate Commerce Act, construed to reach Appellant's operations and subject Appellant to the duties and burdens of a common carrier under the Act, is constitutional.

The power delegated to Congress to regulate commerce among the several states is not an absolute power. It must be exercised in subjection to the due process clause of the Fifth Amendment. (*Currin vs. Wallace*, 306 U. S. 1; *The Pipe Line Cases*, 234 U. S. 548, 560-561, 563; *Railroad Retirement Board vs. Alton RR. Co.*, 295 U. S. 330; *United States vs. Chicago, Milwaukee, St. Paul & Pac. RR. Co.*, 282 U. S. 311; *Interstate Commerce Commission vs. Brimson*, 154 U. S. 447.) The power granted to Congress is the power "to regulate commerce." Congress is without power "to do anything about commerce which is not regulation."

In general the restraints imposed on the Congress by the due process clause of the Fifth Amendment are the same as the restraints imposed on the States by the due process clause of the Fourteenth Amendment. (*Bowles, Price Administrator, vs. Willingham*, 321 U. S. 503, 518; *Hansberry et al. vs. Lee et al.*, 311 U. S. 32, 42-44; *Curry vs. McCanless*, 307 U. S. 357, 370; *Heiner vs. Donnan*, 285 U. S.

312, 326; *Coolidge vs. Long*, 282 U. S. 596; *Nebbia vs. New York*, 291 U. S. 502.)

Because of the due process clause of the Fourteenth Amendment, a State cannot "by mere legislative fiat or by any regulating order of a commission convert into a public utility" a pipe line which has never been devoted by its owner to use by the public, "or make its owner a common carrier." (*Producers Transportation Company vs. Railroad Commission of California*, 251 U. S. 228; *Michigan Public Utilities Commission vs. Duke*, 266 U. S. 570; *Frost & Frost Trucking Company vs. Railroad Commission of California*, 271 U. S. 583; *Washington vs. Kuykendall, et al.*, 275 U. S. 207; *Smith vs. Cahoon, Sheriff*, 283 U. S. 553.) While a state may, in the reasonable exercise of the police power, regulate the operations of a private carrier for hire, it cannot, consistently with the Fourteenth Amendment, by legislative fiat, require such private carrier to become a common carrier. Any legislative requirement that such private carrier become a common carrier would amount to a prohibited taking of property. (*Smith vs. Cahoon, Sheriff, supra; Frost & Frost Trucking Company vs. Railroad Commission of California, supra; Michigan Public Utilities Commission vs. Duke, supra.*)

Again, where a pipe line owner uses its pipe line only to transport its gas to market, a state cannot require such pipe line owner to become a common carrier. (*Texoma Natural Gas Company* vs. *Railroad Commission of Texas*, D. C., 59 Fed. (2d) 750, 753.)

(a) The Power to Regulate Commerce Does Not Include the Power to Convert a Private Carrier Into a Common Carrier.

Because of the due process clause of the Fifth Amendment, the Congress cannot by legislative fiat convert a private pipe line into a public utility, or require its owner to

become a common carrier. (Chief Justice White's concurring opinion, *The Pipe Line Cases*, 234 U. S. 548, 562-563.) The power to regulate commerce "cannot be made a means of exercising powers not entrusted to it (Congress) by the Constitution." (Mr. Justice Holmes' majority opinion, 234 U. S. 560-561.) The power to require a private carrier to become a "common carrier" is withheld from Congress by the Fifth Amendment.

The Constitution protects a citizen in his right to move his property from one state to another by his privately owned and operated means. This right existed before the Constitution was adopted, and was not surrendered in the adoption of the Constitution. The right may be enjoyed by using the highways and privately owned and operated vehicles, or by purchasing a right of way and constructing and operating a private railroad or pipe line. (*Pennsylvania Railroad Company* vs. *Public Utilities Commission of Ohio*, 298 U. S. 170.) The exercise of the right may be regulated by Congress; but Congress cannot, under the guise of regulation, condition the exercise of the right by requiring the user to become a common carrier and make of his property a public utility. The power to regulate the exercise of a right does not include the power to take for a public use private property essential to the exercise of the right. "Conduct may be regulated which cannot be initially commanded • • •." (Mr. Justice McKenna's dissenting opinion in *Pipe Line Cases*, 234 U. S. 565), and so, while Congress may regulate interstate commerce, Congress cannot command that a citizen engage in interstate commerce as a common carrier or otherwise. Any such attempt would necessarily involve an effort to take property without due process of law.

Exercise by a governmental agency of a constitutional power, such as the power to regulate interstate commerce, cannot be made the means of accomplishing a forbidden

or unconstitutional result, such as the taking of private property for a public use without compensation. This principle is stated in and its application illustrated by the following opinions of this Court:

Fidelity & Deposit Co. vs. *Tafoya,* 270 U. S. 426, involved the question of the right of a state to refuse to admit a foreign corporation to do business within its borders. It was held that while the state may for any reason, or no reason, refuse the right to enter such state, such refusal cannot be conditioned upon such corporation's agreement to forego a constitutional right. Mr. Justice Holmes (270 U. S. 434), in the opinion, said:

> "Coming then to the merits we assume in favor of defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

Western Union Telegraph Company et al. vs. *Foster and Macleod et al.,* 247 U. S. 105, involved the validity of a state commission order requiring the sale of information to a particular person. The information was purchased by the telegraph company from the stock exchange and transmitted to other states and sold by the telegraph company. In that case the Court, in an opinion by Mr. Justice Holmes, said (247 U. S. 114):

> "It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, • • • and a con-

stitutional power cannot be used by way of condition to attain an unconstitutional result."

So, Congress cannot under the guise of regulation attain the unconstitutional result of forcing a person to surrender his property to a public use without compensation. While Congress has the power "to regulate commerce • • • among the several states," such grant of power is limited to the power "to regulate," and cannot be exercised to compel a citizen to surrender a right in property protected by the Fifth Amendment.

The Interstate Commerce Act, as construed by the majority of the trial court, preserves to the citizen his right to construct a pipe line from one state to another on a right of way acquired by purchase and to use the pipe line for the purpose of moving his own oil as an incident to his principal business, but it imposes upon the exercise of the right the condition that the pipe line be made a public utility and the owner become a common carrier. So construed, the Interstate Commerce Act is made to attain an unconstitutional end by forcing the citizen to surrender rights in property which are protected against such action by the due process clause of the Fifth Amendment.

(b) The Term "Future Pipe Line Company"

The majority of the trial court states (R. Vol. I, p. 86) that Appellant is a 'future' pipe line company," and grounds the holding upon the fact that Appellant's pipe line was constructed after the enactment of the 1920 Amendment. One sentence in the opinion in *The Pipe Line Cases* is the basis of the conclusion of the majority of the trial court that Congress can compel any person who may in the future construct a pipe line for use exclusively in moving his own oil from one state to another to assume the duties and burdens of a common carrier. The effect of this sen-

tence as treated by the trial court is to hold that by the 1920 Amendment Congress has prohibited any person from building a pipe line from one state to another for the transportation of oil unless such person becomes a common carrier and makes of his pipe line a public utility. The sentence is (234 U. S. 561): "So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid." Upon the basis of that sentence the trial court held that Appellant "is a 'future' pipe line company;" and that the Act, construed to make Appellant a common carrier, is valid. When considered in connection with its context, the sentence does not support such conclusion. To give such effect to the sentence, it is necessary that it be isolated from the balance of the opinion.

In *The Pipe Line Cases* the Court found that the Hepburn Amendment was directed at certain pipe line operations and that its evident purpose was "to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price"—pipe lines that were common carriers "in everything but form." The constitutional question was whether or not Congress had power under the Commerce Clause to regulate as a common carrier a pipe line that in effect had been devoted by its owners to the use of the public and which, as operated, was a common carrier in substance, though not a common carrier in technical form as understood at common law. The Court found that there was no prohibited taking of property in allowing the amendment to have its intended application to such existing pipe lines. The sentence with reference to future pipe line amounts to nothing more than a statement that Congress could for the future require pipe lines which might be operated as common carriers in substance to be-

come common carriers in form. In such a situation there is no prohibited taking of property, for exercise of the power to regulate is based on the fact that the owner has first devoted his property to the use of the public and is a common carrier in everything but form. Mr. Justice Holmes certainly did not mean to say that for future application Congress could condition the constitutional right of a citizen to use his own private means in moving his property from one state to another upon the citizen's making a common carrier of the means of accomplishing such movement. To so interpret the sentence would charge him with saying that the power to regulate commerce may be exercised to require a citizen to surrender rights in property which are within the protection of the Fifth Amendment.

Congress may act to regulate persons engaged, or to engage, as carriers in moving property from one state to another and to regulate the means by which such movement is accomplished. The owner of the means of accomplishing such movement can dedicate his means to a public use, but the power to regulate commerce cannot be exercised to force an owner to make such dedication of his property. Admittedly the power "to regulate commerce" cannot be exercised to take for a public use property which, at the time of the enactment of the statute, was being used in moving property from one state to another but which the owner had not dedicated to a public use. It is, however, assumed by the majority of the trial court upon the basis of the above-quoted sentence from *The Pipe Line Cases* as to future pipe lines, that Congress may require one who in the future uses his private pipe line in the private movement of his property from one state to another, to surrender his pipe line to a public use. The constitutional protection against the taking of property without due process of law is not directed exclusively against statutes that may have an *ex post facto* or present application, it is

also directed against statutes intended for prospective application. Until the owner of property voluntarily dedicates his property to a public use, Congress is without power to require its dedication to a public use, or condition the right to use the property for some lawful purpose upon a requirement that the property be made available to the use of the public.

If it once be conceded, as it must be, that the right exists to build a private pipe line from one state to another over a purchased right of way, the constitutional objection to a statute requiring that the owner of such pipe line make of it a public utility, is just as valid when applied to pipe lines constructed subsequent to the enactment of the statute, as it is when applied to pipe lines that existed prior to the enactment of the statute.

The only consideration given to the constitutional questions by the majority of the trial court is found in the next to the last paragraph of its opinion. There the whole matter is disposed of on the basis of the one sentence concerning future pipe lines, isolated from its context.

The majority of the court, in the case at bar, exhausted its consideration of the constitutional questions with the simple statement that Appellant is "a 'future' pipe line company."

In considering this statement of Mr. Justice Holmes, we are given the choice of treating it either as *obiter dictum* or a statement applicable only to the issues of that case. We must attribute to this great jurist either an attempt to fix the legal status of corporations yet unborn, or "an application of the judicial mind to the precise question necessary to be determined." (*Carroll vs. Carroll's Lessee*, 16 How. 275, 287).

It requires no citation of authority to establish the proposition that statements in a court's opinion should apply

to the precise issue involved, rather than matters not before the court, if such application can reasonably be made; and it is not only reasonable, but logical as well, to say that Mr. Justice Holmes' reference to "future pipe lines" was intended to refer to pipe lines of the same nature as those involved in the case before him, that is, "common carriers in substance, if not in form."

Considering this statement as an integral part of its context, one need only look to the sentence immediately preceding, to reach the conclusion that Mr. Justice Holmes recognized that the statement was limited by the constitutional requirements of due process. The preceding sentence is:

> "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form."

The last sentence cannot be reconciled with the interpretation placed by the majority of the trial court on the first quoted sentence, namely, that Congress has unlimited power to restrict and regulate private business, but it is in accord with the concurring opinion of Chief Justice White in the same case (234 U. S. 562) in which it was said that the Uncle Sam Oil Company could not be brought under the statute "without violating the due process clause of the Fifth Amendment."

If the holding of the majority below is followed to its logical conclusion, the doctrine announced becomes most remarkable. It means that a statute, which in its inception violates the Constitution, is enforceable against any person engaged in an activity against which the statute is directed, provided he commences that activity subsequent to the enactment of the statute.

By this procedure, the Constitution would become impotent simply by the passage of time. Individuals born and corporations organized subsequent to the passage of legislation could not look to the Constitution as the "supreme law of the land," as declared in Article VI, Clause 2 of the Constitution, but must consider subsequently enacted statutes as superior to the Constitution. Overruled would be a mass of decisions of this Court, beginning with *McCulloch* vs. *Maryland*, 4 Wheat. 316, and *Marbury* vs. *Madison*, 1 Cranch. 137. A large number of individuals and corporations would be governed by one law and the remainder by another law. One organization might be engaged in private business while its competitor would be required to operate as a public utility, depending on when Congress had impressed the public utility status on the business. Abrogated would be the holding of this Court in *Norton* vs. *Shelby County*, 118 U. S. 425, wherein it was held:

> *"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."*

and in *Chicago, Indianapolis & Louisville Railway Company* vs. *Hackett*, 228 U. S. 559; *Ex Parte Siebold*, 100 U. S. 371, 376, and other cases where a similar principle was announced. Condemned would be the decision in *Town of South Ottawa* vs. *Perkins*, 94 U. S. 260, where this Court said:

> "It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law today, and not a law tomorrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges."

It is thus submitted that it could hardly have been the intention of Mr. Justice Holmes to render the Constitution impotent and wreck a large body of constitutional law by a single sentence wholly unnecessary to the decision in which it was written.

This is not to say there may not be cases in which a person may be estopped to claim constitutional immunities. A person who has received and accepted benefits under a statute may be estopped to claim that the statute is unconstitutional, as where a foreign corporation attacks the constitutionality of a state statute under which it has received benefits. *Wall, et al.* vs. *Parrot Silver & Copper Company*, 244 U. S. 407; *Pierce Oil Corporation* vs. *Phoenix Refining Company*, 259 U. S. 125. But it is equally true that where no benefit is received there is no estoppel. *Buck* vs. *Kuykendall*, 267 U. S. 307; *Ashwander* vs. *Tennessee Valley Authority*, 297 U. S. 288; *Thompson* vs. *Consolidated Gas Utilities Corporation*, 300 U. S. 55.

In the case at bar there are no elements of estoppel. Appellant has received no benefits from the Act. Indeed, the Interstate Commerce Act does not purport to confer benefits; it only imposes burdens. It is purely a regulatory measure. Instead of claiming anything under the Act Appellant has at all times consistently asserted that the Act has no application to its business.

Finally, in pursuing the inquiry into the meaning intended by Mr. Justice Holmes in his "future pipe lines" statement, we obtain much light from his later opinions.

In *Frost and Frost Trucking Company* vs. *Railroad Commission of California*, 271 U. S. 583, this Court held that a state statute, ostensibly enacted to regulate the use of state highways, was unconstitutional because it had the effect of requiring private carriers to become common carriers. In his dissenting opinion, rendered long after the decision in *The Pipe Line Cases, supra*, Mr. Justice Holmes

said: "I see nothing in this Act that would require private carriers to become common carriers, but if there were such a requirement, it * * * would not be before us *now*." The statement is not in harmony with the position that Mr. Justice Holmes, in *The Pipe Line Cases*, was adjudicating the status of future lines, nor does it accord with the contention that a legislature has the authority to impress a common carrier status upon a private carrier.

Again, in the dissenting opinion of Mr. Justice Brandeis, Mr. Justice Holmes concurring, in *New State Ice Company* vs. *Liebmann*, 285 U. S. 262, 283, there is this statement:

> "Of course, a legislature cannot by mere legislative fiat convert a business into a public utility. Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230."

The cases of *Western Union Telegraph Company et al.* vs. *Foster and Macleod et al.*, 247 U. S. 105, and *Fidelity and Deposit Company of Maryland* vs. *Tafoya*, 270 U. S. 426, cited above, in which Mr. Justice Holmes delivered the opinions of this Court, involved questions of the power of a state to deprive a corporation of its rights under the Federal Constitution as a condition to doing business within the state. Conceding that the state might arbitrarily exclude a corporation from doing business within its borders "without other reason than that such is its will," Mr. Justice Holmes nevertheless held that this right could not be used "to accomplish a forbidden result," that is, to deprive the corporation of its constitutional rights (*Fidelity and Deposit Company of Maryland* vs. *Tafoya, supra*). In those cases the Court specifically held that a corporation's rights could not be taken from it as a condition of doing business in a state. In view of these holdings, it could hardly be contended that Mr. Justice Holmes intended to hold that Congress, by ordinary enactment, could deprive a corpo-

ration of its constitutional rights. For, as this Court has said in *Hamilton* vs. *Kentucky Distilleries, supra*, the restraints imposed by the Fifth Amendment upon Congress are the same as those which apply to the police powers of the state under the Fourteenth Amendment.

It is submitted, therefore, that in accordance with ordinary rules of construction and in the light of subsequent adjudicatory statements by Mr. Justice Holmes, there is no basis for the holding of the majority of the trial court as to the meaning of his statement about "future pipe lines."

Manifestly, the statement was directed to the "precise question necessary to be determined," and nothing else; that is, future pipe lines "in substance" could be subjected to the provisions of the statute, as well as those which were pipe lines "in form."

Moreover, if the above quoted sentence had meant what the trial court thought it meant, then this Court could have disposed of the *Valvoline Case* on the holding that it was a "future" pipe line company, for Valvoline extended its line into West Virginia in 1913, and into Ohio in 1926 (Valvoline's Brief, 4; R. Vol. II, p. 939).

(c) The Public Is Without Interest in the Appellant's Operations

The majority in the trial court based their decision solely on an interpretation of the words of the statute. They went no further than that. They were done with the case when they concluded that the language of the statute was broad enough to include private owners of pipe lines, whether they operated as carriers or not. They gave little consideration to the issue of whether the public has any interest in Champlin's line or Congress has the power, by naked legislative fiat, to convert a private business into a public utility. Yet this Court has spoken on these con-

stitutional questions so many times that they can hardly be ignored in a proper interpretation of the principles applicable to this case.

The basis of power in the Government to regulate a private business is that the business must be "affected with a public interest." This Court announced that principle many years ago (*Munn* vs. *Illinois*, 94 U. S. 113, 126), and has consistently held ever since that a statute which undertakes to regulate a business not clothed or affected with a public interest violates the due process clause of the Constitution. *New State Ice Company* vs. *Liebmann*, 285 U. S. 262, 278; *Burns Baking Company* vs. *Bryan*, 264 U. S. 504, 513; *Liggett Company* vs. *Baldridge*, 278 U. S. 105, 113; *Wolff Packing Company* vs. *Court of Industrial Relations*, 262 U. S. 522; *Tyson & Brother* vs. *Banton*, 273 U. S. 418; *Fairmont Creamery Company* vs. *Minnesota*, 274 U. S. 1; *Ribnik* vs. *McBride*, 277 U. S. 350; *Williams* vs. *Standard Oil Company*, 278 U. S. 235, 239.

It is true that the phrase "affected with a public interest" is not subject to positive definition, but as said in *Williams* vs. *Standard Oil Company, supra*:

> "Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with Munn v. Illinois, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured."

Whether or not a particular business is affected with a public interest depends upon the facts and circumstances peculiar to such business in its relation to the public. This was aptly stated by this Court in *Nebbia* vs. *New York*, 291 U. S. 502:

> "It results that a regulation valid for one sort of business, or in given circumstances, may be invalid

> for another sort, *or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.* • • •
>
> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is *to determine in each case* whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

To satisfy the requirements of this principle this Court set out in detail in its opinion in the *Nebbia* case, *supra*, the facts, circumstances and conditions under which it concluded that the milk industry in New York was subject to regulation. In *Munn* vs. *Illinois*, *supra*, this Court at great length recounted the facts to show that the grain elevator business was charged with a public interest. The same was true of the many other cases involving this question, both those in which the Court upheld the regulation and those in which the Court condemned it as a violation of due process.

Yet in this case the majority of the trial court declined to consider the facts at all. They stopped with a finding that Congress intended to include all pipe lines, whether public or private, within the application of the statute, as witness the following language of their opinion:

> "Congress intended to include all pipe lines without regard to whether they were private lines or carried for the public" (R. Vol. I, p. 85).

And again:

> "Plaintiff attempts to demonstrate that it does not fall within the coverage of the Act by asserting that it is not in fact a common carrier. The Act makes it a statutory common carrier" (R. Vol. I, p. 86).

In taking this position the majority of the trial court erred. This Court has repeatedly held that "the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question" and that the "circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest *are always a subject of judicial inquiry.*" (*Wolff* vs. *Industrial Court*, 262 U. S. 522, 536; *Tyson & Brother* vs. *Banton*, 273 U. S. 418, 431; *Lawton* vs. *Steele*, 152 U. S. 133; *New State Ice Company* vs. *Liebmann*, 285 U. S. 262; *Williams* vs. *Standard Oil Company*, 278 U. S. 235; *Nebbia* vs. *New York*, 291 U. S. 502.

A judicial inquiry into the facts of this case will disclose that the public has no interest in operation of a pipe line such as that owned by Appellant. Indeed, no claim is made that Appellant ever held itself out as a common carrier of petroleum products by pipe line, or ever carried the products of another. It simply operated the line as a plant facility for its own convenience in getting its products to market. So if there is any public interest involved, it is derived from the nature of the business conducted and not by any dedication on the part of Appellant. But here again the test fails. The evidence shows conclusively that the public receives no benefits from this line, either in services or costs of petroleum products, over those existing prior or subsequent to the construction of the line. Likewise, a cessation in the operation of the line would result in no change whatever in general marketing conditions of petroleum products to the public. The evidence is undisputed that the prices at which Champlin sells its products at the three terminals on its line are fixed by competitive conditions existing at these places, over which Champlin has no control, and bear no relation to the cost of moving the

products by pipe line. Again, the company does only about three and one-half per cent of the business in the trade area served by its products line. (R. Vol. II, pp. 528-529.) The service to the public would be no different if Champlin's business were discontinued. Absent here are all the factors upon which this Court bottomed its decision in *The Pipe Line Cases, supra*, namely, monopoly of transportation, monopoly of market, forced sales by producers, power to fix prices, combination of pipe lines, and the carrying of "everybody's oil to market." As heretofore stated, it is admitted that no crude oil moves through this line; that Champlin uses the line exclusively to move its own products; that it has never carried for nor made exchanges of products with others; that it is operated so that no products could be put into the line at any point other than at the Enid Refinery nor taken out at any point other than at the three storage terminals; that no products have ever been purchased to be transported through the line; and that no products shipped from Enid have ever been consigned for delivery to others but all such products are moved to Champlin's terminals where they are marketed by Champlin. All the facts and circumstances negative any interest on the part of the public in Champlin's line. The necessity for a factual showing of the public interest in the line becomes more impelling when it is remembered that this Court has held that the principal business conducted by Appellant—dealing in petroleum products—to which business this pipe line is solely tributary, is not a business affected with a public interest. *Williams* vs. *Standard Oil Company*, 278 U. S. 235.

But this is not all. Specifically, this Court has held directly in a number of cases that it is beyond the power of a legislature, absent any showing of the public's interest, by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility and to make the owner thereof a public carrier, for the reason that

that would be taking private property for public use without just compensation, in violation of due process. *Producers Transportation Company* vs. *Railroad Commission of California*, 251 U. S. 228; *Michigan Public Utilities Commission et al.* vs. *Duke*, 266 U. S. 570; *Frost and Frost Trucking Company* vs. *Railroad Commission of California*, 271 U. S. 583; *Smith* vs. *Cahoon*, 283 U. S. 553; *Thompson* vs. *Consolidated Gas Utilities Corporation*, 300 U. S. 55; *Stimson Lumber Company* vs. *Kuykendall*, 275 U. S. 207, 210.

Exactly in point, and dealing with a petroleum pipe line, is the case of *Producers Transportation Company* vs. *Railroad Commission of California, supra*, where the Court said (page 230):

> "It is, of course, true that if the pipe line was constructed solely to *carry oil for particular producers* under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, *the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment.*"

The opinion in the *Producers* case was written by Mr. Justice Van Devanter, in which Mr. Justice Holmes concurred. To understand fully the effect of this decision one must examine its background. The opinion was rendered on appeal from a decision of the Supreme Court of California in the case of *Producers Transportation Company* vs. *Railroad Commission of California*, 176 Cal. 499, 169 Pac. 59, and involved the construction of a statute of the State of California purporting to regulate pipe lines. Closely associated with the *Producers* case is another decision by the Supreme Court of California rendered at the

same time and involving the same statute, styled *Associated Pipe Line Company* vs. *Railroad Commission of California*, 176 Cal. 518, 169 Pac. 62. The latter decision is cited with approval by Mr. Justice Van Devanter in the *Producers* case.

The facts in these two California cases show that the State of California had enacted a statute purporting to regulate oil pipe lines, one section of which declared every individual, association or corporation using, operating, owning, managing, or controlling a pipe line to be a common carrier, regardless of whether it had voluntarily devoted its line to the use of the public. In *Associated Pipe Line Company* vs. *Railroad Commission of California, supra*, the Supreme Court of California held that the latter section violated the due process clause of the Constitution and that the Associated Pipe Line Company was not a common carrier under the Act. The facts in the *Associated* case showed that Associated and Kern Oil and Trading Company jointly constructed a pipe line for the carrying of their own oil and that no oil had been transported through the line other than that belonging to the two owners. In the *Producers* case, however, the Supreme Court of California found that Producers Transportation Company had devoted its property to a public use.

Speaking through Mr. Justice Van Devanter, the Supreme Court affirmed the decision in the *Producers* case, and cited the *Associated* case (page 231) as an authority. Significantly, the opinion brings the *Producers* case within the rule of *The Pipe Line Cases*, 234 U. S. 548; and by the citation of the *Associated* case as an authority, there is implicit in the decision the inference that Associated would not be a common carrier under the provisions of the Interstate Commerce Act.

In the cases last cited the announced rules involved restraints upon the power of the states under the Four-

teenth Amendment. These rules apply to the case at bar, however, for it has been repeatedly stated by this Court that the limitation of due process imposed upon the states by the Fourteenth Amendment is no different from that imposed upon Congress by the Fifth Amendment. *Heiner* vs. *Donnan*, 285 U. S. 312, 326; *Coolidge* vs. *Long*, 282 U. S. 582, 596; *Foley Securities Corporation* vs. *Commissioner of Internal Revenue* (Eighth Circuit), 106 Fed. (2d) 731, 736; *Morehead, Warden* vs. *New York ex rel. Tipaldo*, 298 U. S. 587.

Furthermore, the power of Congress to regulate business under the Commerce Clause of the Constitution is no greater than that of a state within its sphere, under its police power. Both are equally subject to the restraints of due process. It has been said that the power of the state to regulate business stems from its inherent police powers (*License Cases*, 5 How. 504, 583; *Nebbia* vs. *New York, supra*) and that while the Federal Government possesses no police power (*In Re Rahrer*, 140 U. S. 545, 555),

> "* * * it is none the less true"

as was said in *Hamilton* vs. *Kentucky Distilleries*, 251 U. S. 146,

> "that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."

See also: *Oklahoma City* vs. *Sanders*, Tenth Circuit, 94 Fed. (2d) 323, 327. The one is no greater than the other (*Hamilton vs. Kentucky Distilleries, supra*, pp. 156-157).

It logically follows, therefore, that any rule of restraint arising under the Fourteenth Amendment, affecting the states in their regulation of business, applies with equal

force to the interpretation of an act of Congress affecting interstate commerce under the Fifth Amendment (*Nebbia vs. New York, supra,* p. 525).

Moreover, if the interpretation placed on the statute by the Government would render the statute unconstitutional, then it should be given an interpretation, if possible, which would render it constitutional. *Reinecke* vs. *Northern Trust Company,* 278 U. S. 339; *Russian Volunteer Fleet* vs. *United States,* 282 U. S. 481; *Porter* vs. *Investors Syndicate,* 286 U. S. 461; *Interstate Commerce Commission* vs. *Oregon-Washington Railroad and Navigation Company,* 288 U. S. 14; *Anniston Manufacturing Company* vs. *Davis,* 301 U. S. 337.

Furthermore, it is the rule that an act of Congress must not only be given a construction under which it may be held constitutional, if possible, but it must be construed in a manner to avoid even any grave doubts as to its constitutionality. *Driscoll* vs. *Edison Light and Power Company,* 307 U. S. 104, 115; *United States* vs. *La Franca,* 282 U. S. 568, 574; *Thompson* vs. *Consolidated Gas Utilities Corporation,* 300 U. S. 55, 75, 76; *Richmond Company* vs. *United States,* 275 U. S. 331, 346; *Phelps* vs. *United States,* 274 U. S. 341; *Lucas* vs. *Alexander,* 279 U. S. 573, 577. It is also to be assumed that Congress was aware of the decisions of the Supreme Court and intended to legislate in harmony with those decisions. *Koenigsberger* vs. *Richmond Silver Mining Company,* 158 U. S. 41; *Blake* vs. *McKim,* 103 U. S. 336, 339; *District of Columbia* vs. *Murphy,* 314 U. S. 441.

The Interstate Commerce Act, as construed by the majority of the trial court to make of Appellant a common carrier subject to regulation under the Act and charged with the duties and burdens there imposed, has the effect to take Appellant's property in violation of the due process clause of the Fifth Amendment.

IV

The error of the District Court in dismissing Appellant's petition.

The foregoing argument demonstrates:

(1) that Appellant is not engaged in "transportation" within the meaning of that term as used in the Interstate Commerce Act;

(2) that Appellant is not a common carrier within the meaning of the term "common carrier" as used in the Interstate Commerce Act, nor within the common law meaning of that term;

(3) that Appellant is not a "statutory common carrier";

(4) that Appellant is not a "common carrier" in fact, in substance, or in form, within the decision in *The Pipe Line Cases*, nor is Appellant engaged in a pipe line operation within the reach of the statute within the decision in the *Valvoline Case;*

(5) that the operations of the pipe line do not bring Appellant within reach of the Interstate Commerce Act;

(6) that Appellant is not a "future pipe line" company in the sense in which that term was used in *The Pipe Line Cases;*

(7) that the public is without interest in Appellant's operations; and

(8) that the Interstate Commerce Act, as construed by the majority of the trial court to impose upon Appellant the status of a common carrier, is unconstitutional.

It follows that the action of the majority of the trial court in dismissing Appellant's petition was error.

WHEREFORE, it is respectfully submitted that the judgment of the trial court should be reversed and injunction should issue restraining enforcement of the order issued by the Interstate Commerce Commission against Appellant, all as prayed for in Appellant's amended petition; and Appellant now prays for the judgment of this Court accordingly.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX

Chap. 104—An Act to Regulate Commerce (24 Stat. 379), February 4, 1887.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States, through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be

reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

* * * * * * * *

Section 1 of Hepburn Amendment (34 Stat. 584), June 29, 1906

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not

apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. The term 'railroad', as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and

eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interest free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufac-

tured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Section 1 of the 1920 Amendment to Interstate Commerce Act (41 Stat. 474-478), February 28, 1920

The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other

charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.' The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'transmission' as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation

upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of service.

(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and

delivery of property subject to the provisions of this Act which may be necessary of proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.